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# EVOLUTION OF JURISPRUDENCE

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The history of jurisprudence is but the tracing of the world's civilization. All students of history subscribe to what may be termed the patriarchal theory of the division of the human race into organized communities. At least, all known societies were originally organized on the model of the Hebrew patriarchs as revealed through Scriptural history. The eldest male parent is absolutely supreme in his household; his dominion extends to life and death, over wife, child, and slave, and the title of every species of property claimed by any member of the family inheres in him.

Archaic society was not formed by a collection of individuals, but was an aggregation of families. The unit of ancient society was the family; of modern society the individual. The head of the family at the same time declared and administered the law in his sphere of dominion. This law was but the individual will arbitrarily expressed and largely the reflex of the character of the male parent, shaped and directed by his environment. The union of families from a common stock into communities most probably formed the first effort of the human race towards organized society. New comers were incorporated into it by the law of adoption, which consists of feigning themselves to be of the same stock as the people on which they were engrafted.

This limited and circumscribed society acknowledged a chief or king, who discharged all governmental and judicial functions. At this social epoch, law was but a judgment in the particular case, and not the enunciation of a principle. The judgment of the king was assumed to be the result of a direct divine inspiration. Afterwards came the notion that the established customs of the people should be enforced, and the judgment but affirmed the custom or punished its breach. When aristocracies succeeded to the power of kings, they became the depositories and administrators of law, without claiming direct inspiration for each deliverance of judgment. The law enforced by them was the established customs of the people, or customary law. This was before the era of printing, and the people generally conceded to the higher class that superior wisdom and learning which capacitated them to preserve and transmit their ancient usages. These usages in time were succinctly expressed in general terms in codes. The earliest code was but a recognition of the truth that recorded words are more trustworthy than individual memory. The importance of codes is manifest. They afforded protection against the frauds of the oligarchy, and the debasement of national institutions.

So vast in extent is my subject, that I cannot in the limited time for this paper even attempt to discuss the development of jurisprudence during the epochs to which I have given such brief notice. The remainder of what I have to say concerns the evolution of jurisprudence through the administration of the law by the courts. I will assume, for it is easily demonstrable, that an unelastic code, promulgated in the formative period of a state, would soon become obsolete. Law is stable, but civilization is progressive, and here we find exercise for the great principle of evolution; i. e. of evolving from fixed legal dogmas the multiform corollaries and deductions from the main proposition in the solution of the questions at issue. Perhaps the evolution of jurisprudence through judicial administration may be better illustrated by reference to the two great systems of jurisprudence which have influenced modern civilization. These

two systems are the Roman or Civil Law, and the English Common Law, which prevails in parts of the British Empire and in the United States.

## ROMAN LAW

The Roman law was simply the code of a single city-state, a code that grew out of a body of unwritten municipal customs, a special knowledge of which was for a long time confined to an aristocracy or oligarchy who claimed to be the sole repository of the principles by which controversies should be determined. The Roman Code of the Twelve Tables was merely an enunciation in written words of the existing customs of the Roman people, put forth at a time when Roman society had barely emerged from that intellectual condition, in which civil obligation and religious duty are inevitably confounded. New questions were constantly occurring, calling for an interpretation of the Code. This demand was met by the publications of the *juris consults*, under the name of "*Responsa Prudentum*," The form of these responses varied a good deal at different periods of the Roman Empire, but throughout its whole course, they consisted of explanatory glosses on authoritative written documents, and at first they were exclusively collections of opinions interpretative of the Twelve Tables. The commentators thus educed a variety of canons which had never been dreamed of by the compilers of the Twelve Tables, and which were rarely or never found there. These "*Responsa Prudentum*" were used by the judges in pronouncing judgment as authority and precedent for the law there applied. In this way the "Twelve Tables" were evolved from a narrow statement of the customs of a primitive people, into a compendious system of law which today is the admiration of both philosopher and lawyer.

But this was not the only means of development of the *jus civile*. The arts and the sciences were being rapidly developed, commerce brought the people from every quarter of the then known world, and the civilization was daily becoming more complex, and it will be apparent that a few

positive declaratory laws designed for a primitive people, under the most liberal construction, could not cover the countless cases arising from changed conditions. Besides the *jus civile*, was only administered where both litigants were Roman citizens. The disputes between foreigners were not judged by the law of the "Twelve Tables," neither was a foreigner entitled to the remedial processes of the courts. As much of the Roman wealth was derived from commerce, business with foreigners was encouraged. The foreign merchant demanded the corresponding obligation that the State should accord to him protection in property rights. So it was necessary to constitute a special court wherein the rights of foreigners were to be adjusted and enforced. This was met by *constitutinga praeter peregrinus* (the praetor of foreigners) whose duty it was to administer justice between Roman citizens and foreigners, between foreigner and foreigner, and between citizens of different cities within the empire. As such praetor could not rely upon the law of any one city for the criteria of his judgments, he naturally turned his eyes to the codes of all the cities from which came the swarm of litigants before him. In the generalizations necessarily made upon such broad data we have the beginnings of comparative jurisprudence, whose first fruit at Rome was the ascertainment of the fact, that there are certain uniform and universal conceptions of justice common to all civilized people. Some common characteristic was discovered in all of them, which had a common object, and this characteristic was classed in the *jus gentium*. This *jus gentium*, or law common to all nations, is what the lawyer would call the Equity of the Civil Law. The praetor, who was the chancellor, was required on commencing his year of office to publish an edict or proclamation, in which he declared the manner in which he intended to administer his department. As it was impossible to construct anew every year a separate system of principles, the praetor seems to have regularly published his predecessor's edict, with such additions and changes as the exigency of the moment, or his own views of law compelled him to in-

troduce. The praetor's proclamation, thus lengthened by a new portion every year, attained the name of the *edictum perpetuum.* This plan of annually publishing the edict ceased in the reign of the Emperor Hadrian. The last edict of a praetor was issued by Salvius Julianus, and comprises the whole body of Roman equity jurisprudence.

Thus we find that the Civil Law as now enforced in France and every Latin country, in its basic principles was worked out and evolved by the juris consults and praetors without the aid of the law making power of the State. Nowadays we would call this "judge made law."

## THE COMMON LAW OF ENGLAND

It is generally accepted that the system of jurisprudence denominated the common law of England was evolved from ancient usages and customs. The laws promulgated by the English king Aethelbert, the convert of the abbot Augustine, and by many of his successors, were mainly of the nature of amendments of custom. It was not until the reign of that able and vigorous monarch, Aelfred, or Alfred the Great, that the collection of laws aspired to the character of codes. The judges who presided over the primitive courts were close to the common people, and were very jealous in their adherence to these laws, which had not only the royal sanction, but were enactments of the honored usages of the people themselves. The primitive system of law which thus matured in the provincial courts of the English people soon took on an iron rigorism of form which rendered it unelastic. Its entire inadequacy to the wants of a progressive civilization was strongly apparent upon the Norman Conquest. With the Norman occupation, came the establishment of a great court at Westminster, by whose agency a new system of royal law, which found its source in the king, was brought in to remedy the defects of the old, unelastic system of the customary law prevailing in the provincial courts of the people. As soon as this new judicial system became operative, as said by Mr. Digby, "decisions of tribunals came to constitute, in the strictest sense of the

term, a source or cause of law. Judge-made or judiciary law henceforth gradually displaced customary law." It was now that "the codeless myriad of precedents, the wilderness of single instances," began to be evolved, which contain the flexible dogmas of the common law. Mr. Dicey, in a recent book, has said: "The amount of judge-made law is in England far more extensive than a student easily realizes. Nine-tenths, at least, of the law of contract, and the whole, or nearly the whole, of the law of torts, are not to be discovered in any volume of the statutes." It may be a matter of surprise to learn that this most complicated and compendious system of jurisprudence owes its development to a fiction. That fiction is the assumption that there exists appropriate law for every conceivable set of circumstances; the law always exists in the breast of the judge, and only needs the opportunity for its declaration and application. The new principles announced are assumed to be drawn from a pre-existing nebulous body of customary law, ample enough to supply doctrines for any possible condition of affairs. Let me give an instance of the application of the old customary law of the sixth century to the strenuous civilization of the present day. Of course neither Ethelbert nor Alfred the Great ever saw a trolley car; they never even dreamed about electrical motive power. Away back yonder developed the principle that a man might acquire the right, either by purchase or long use, to walk over his neighbor's ground. When this right was complete the neighbor could not revoke it, but he could object to his land being subjected to any other servitude. The next step was that inasmuch as the private way could not be obstructed, and as travel by horseback was becoming general, the user of the right of way might ride without imposing any additional servitude on the way. Civilization progressed and carriages became common, so the carriage was allowed as being included in this right to pass over the neighbor's land. And the transition to horse cars, and then to electric cars operating on the public streets was easy, on the assumption that as the public must use the streets to go from place to place, every facility

to aid the public in this respect, which did not interfere with the use of the street by foot passengers and horse carriages did not impose upon the streets any new burden. By similar process of evolution the simple laws of a primitive civilization have been extended to conditions created by the most modern development of art, science, invention and social progress.

Fictions were also employed by the courts to circumvent the effect of certain statutes. Even before the reign of the Conqueror feudalism was superseding the older freedom in England, but the tendency was quickened by the Conquest. The feudal system was based on primogeniture entailment of estates, and personal service rendered by the vassal or liege man to the lord of the manor. To prevent disintegration of the large estates a statute of entails was enacted. The judges circumvented this statute by a fictitious proceeding, called a common recovery, by which the present holder of the estate, by suffering a fine and recovery, defeated the limitations over. The tenure of title of the liegeman depended on personal attendance on the lord of the manor in petty strifes. The manorial lord was frequently in need of money, and to supply present necessities would sell his right to demand personal service for a good round sum and an annual tribute of three barley corns or other insignificant stipend. Laws were passed to prevent the alienation, by deed or will, of land held in such manner. This was overcome by judicial invention of what is termed " a use." That is, the owner of the land would convey it to another for his use, and then alien or devise this use. Equity would then interfere and protect the use, and compel a conveyance from the one in whom the legal title vested or his heirs, to the usee or his heirs.

But these fictions were soon superseded by the recognition of that branch of jurisprudence which is called Equity. It was early defined to be the "correction of that wherein the law by reason of its universality is deficient." A court of equity was considered a court of conscience. Equity undertook to relieve the severities and inequalities of the law

by the application of moral principles. The idea was fundamental that equity followed the analogies of the law, yet in reality it frequently opposed the law. The whole equitable jurisprudence is founded on moral rules proceeding on the theory that in a given instance it would be unconscionable to apply the rigid rule of law, or if the strict rule of the law be applied, it is inadequate to afford the proper relief to the complaining party. It is but natural that, founded on such broad basic principles, equity should expand into an almost limitless sphere of action.

Thus it will be seen that the English common law and equitable jurisprudence has, through the growth of centuries, developed into its present state of effectiveness, not from legislation, but by the process of evolution. Perhaps in no other science do we find the principles of evolution the principle of growth and adaptability, better illustrated than in jurisprudence. As law is stable and civilization is progressive, the two can only be kept in harmony by evolutional development, and this result has been attained largely through the medium of judicial interpretation and exposition.